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ELIZABETH DOLE, SECRETARY
OF LABOR, ET AL., PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

The Paperwork Reduction Act of 1980 requires, among other matters, that the Office of Management and Budget (OMB) review federal agency information collection activities to determine whether the collection of information is necessary for the proper performance of the functions of the agency. In this case, OMB reviewed and disapproved three provisions of the Secretary of Labor's hazard communication standard, which requires employers to communicate chemical hazard information to their employees. The question presented, which arises in a contempt action against the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health, is whether the Paperwork Reduction Act's review process applies to agency regulations, developed as part of the agency's statutory mission, that require regulated entities to collect information for disclosure to third parties.

PARTIES TO THE PROCEEDING

The petitioners are the Secretary of Labor and the Assistant Secretary for Occupational Safety and Health. The following parties participated in the proceeding that is the subject of this petition: the United Steelworkers of America; Public Citizen, Inc.; Building and Construction Trades Department, AFL-CIO; Associated Builders and Contractors, Inc.; Associated General Contractors of America; Construction Industry Trade Associations; and United Technologies Corporation.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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UNITED STEELWORKERS OF AMERICA, ET AL.

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The Acting Solicitor General, on behalf of Elizabeth Dole, Secretary of Labor, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 855 F.2d 108.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 14a-17a) was entered on August 19, 1988. Petitions for rehearing were denied on November 28, 1988 (App., *infra*, 18a-21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3504(c) of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, provides in pertinent part:

The information collection request clearance and other paperwork control functions of the Director shall include:

(1) reviewing and approving information collection requests proposed by agencies;

(2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

* * * * *

44 U.S.C. 3504(c).

Section 3502(11) defines the term "information collection request" as:

a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information.

44 U.S.C. 3502(11) (Supp. IV 1986).

Section 3502(4) defines the term "collection of information" as:

the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either –

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.

44 U.S.C. 3502(4).

Section 3508 provides:

Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

44 U.S.C. 3508.

Section 3518 provides in pertinent part:

(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

* * * * *

(e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget, or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

44 U.S.C. 3518.

The Office of Management and Budget's regulations implementing the Paperwork Reduction Act, which were recently revised (53 Fed. Reg. 16,618 (1988)), provide in pertinent part:

> Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency. The public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure is not included within this definition.

5 C.F.R. 1320.7(c)(2).

STATEMENT

A. The Paperwork Reduction Act

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 *et seq.*, is intended to minimize the burden and maximize the usefulness of the federal government's collection and dissemination of information. See 44 U.S.C. 3501. The PRA assigns principal responsibility for this task to the Director of OMB, who is accountable, among other matters, for developing federal information policies and overseeing their implementation. See 44 U.S.C. 3504(a), (b). The PRA specifically provides:

> The information collection request clearance and other paperwork control functions of the Director

> shall include:
>
> (1) reviewing and approving information collection requests proposed by agencies;
>
> (2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;
>
> * * * * *

44 U.S.C. 3504(c). The PRA defines the term "agency" to include virtually all executive departments, government corporations, and independent regulatory agencies. See 44 U.S.C. 3502(1), (10). It defines the term "information collection request" as "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information" (44 U.S.C. 3502(11) (Supp. IV 1986)). The PRA defines the term "collection of information" as:

> the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either –
>
> (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.

44 U.S.C. 3502(4). The PRA defines the term "record-

keeping requirement" as a "requirement imposed by an agency on persons to maintain specified records" (44 U.S.C. 3502(17) (Supp. IV 1986)), and it defines the term "practical utility" as "the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion" (44 U.S.C. 3502(16) (Supp. IV 1986)).

The PRA provides that each federal agency "shall be responsible for carrying out its information management activities in an efficient, effective, and economical manner and for complying with the information policies, principles, standards, and guidelines prescribed by the Director." 44 U.S.C. 3506(a). Furthermore, a federal agency "shall not conduct or sponsor the collection of information" unless (1) the agency has taken action to reduce the paperwork burden; (2) the agency has submitted the proposed information request to the Director of OMB; and (3) "the Director has approved the proposed information collection request, or the period for [the Director's] review of information collection requests * * * has elapsed." 44 U.S.C. 3507(a) (1982 and Supp. IV 1986).[1]

[1] An agency is required to submit a copy of a proposed rule containing collection of information requirements to the Director no later than the date of the publication of the notice of proposed rulemaking. 44 U.S.C. 3504(h)(1). The Director then has 60 days in which to file public comments on the rule's collection of information requirements. 44 U.S.C. 3504(h)(2). In publishing its final rule, the agency must "explain how any collection of information requirement contained in the final rule responds to the comments * * * or explain why it rejected those comments." 44 U.S.C. 3504(h)(3). The Director may, within 60 days of publication of the final rule, disapprove any collection of information requirement contained in the final rule if he determines that the agency's response is unreasonable or if the agency, without notice, substantially modifies the collection of information requirement contained in the proposed rule. 44 U.S.C. 3504(h)(5)(C), (D).

"Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the function of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information." 44 U.S.C. 3508.[2]

The PRA instructs the Director of OMB to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. 3516. The PRA also specifies the effect of the Act on existing law. It states:

> Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

44 U.S.C. 3518(a). The PRA further provides:

> Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget, or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

44 U.S.C. 3518(e).

[2] The PRA provides that, in the case of independent regulatory agencies, the Director's disapproval "may be voided, if the agency, by a majority vote of its members overrides the Director's disapproval" (44 U.S.C. 3507(c)).

B. The OMB Regulations

The Director of OMB has promulgated regulations, pursuant to 44 U.S.C. 3516, implementing the PRA. See 5 C.F.R. 1320 *et seq.* The regulations, which were first issued in 1983 (48 Fed. Reg. 13,689) and were revised in 1988 (53 Fed. Reg. 16,618), supplement the statute's requirements with additional practical guidance on the meaning of statutory terms and the manner in which OMB shall conduct its paperwork review.

For example, the OMB regulations provide extensive guidance on the practical application of the statutory term "collection of information." See 5 C.F.R. 1320.7(c). As explained above, the PRA defines the term as "the obtaining or soliciting of facts or opinions by the agency" (44 U.S.C. 3502(4)). The OMB regulations interpret that phrase as including "any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information" (5 C.F.R. 1320.7(c)). The PRA also specifies that a "collection of information" may be conducted through various means including "reporting or recordkeeping requirements, or other similar methods" (44 U.S.C. 3502(4)). The OMB regulations explain that a " '[r]ecordkeeping requirement' * * * includes requirements that information be maintained or retained by persons but not necessarily provided to an agency" (5 C.F.R. 1320.7(r)) and that a " '[r]eporting requirement' means a requirement imposed by an agency on persons to provide information to another person or to the agency" (5 C.F.R. 1320.7(s)).[3] More generally, the OMB regulations state:

[3] The OMB regulations further explain that "[s]imilar methods may include contracts, agreements, policy statements, plans, rules or regulations, planning requirements, circulars, directives, instructions, bulletins, requests for proposal or other procurement requirements, interview guides, disclosure requirements, labeling requirements, telegraphic or telephonic requests, and standard questionnaires used to monitor compliance with agency requirements." 5 C.F.R. 1320.7(c)(1).

> Requirements by an agency or a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency. * * *.

5 C.F.R. 1320.7(c)(2).

The OMB regulations set forth the general requirements that an agency must meet to obtain the Director's approval, pursuant to 44 U.S.C. 3507 and 3508, of an information collection request. See 5 C.F.R. 1320.4. First, an agency must demonstrate, in accordance with the statutory criteria, that "it has taken every reasonable step to ensure that:

> (1) The collection of information is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;
>
> (2) The collection of information is not duplicative of information otherwise accessible to the agency; and
>
> (3) The collection of information has practical utility. * * *."

5 C.F.R. 1320.4(b). Next, OMB determines, in accordance with 44 U.S.C. 3508, "whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions." 5 C.F.R. 1320.4(c). "In making this determination, OMB will take into account the criteria listed in § 1320.4(b), and will consider whether the burden of the collection of information is justified by its practical utility." 5 C.F.R. 1320.4(c).[4] In

[4] "In determining whether the information has 'practical utility,' OMB will take into account whether the agency demonstrates actual

addition, "OMB will consider necessary any collection of information specifically mandated by statute or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation." 5 C.F.R. 1320.4(c)(1).

C. The Present Dispute

The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, is intended "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. 651(b)). To accomplish this goal, the OSH Act authorizes the Secretary of Labor "to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce" (29 U.S.C. 651(b)(3)). These standards "require[ ] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment" (29 U.S.C. 652(b)(8)). See 29 U.S.C. 655. The Secretary has promulgated numerous standards regulating occupational exposure to various chemical hazards. See 29 C.F.R. 1900.1000-1900.1101.[5] This suit arises out of the Secretary

timely use for the information either to carry out its functions or to make it available to the public, either directly or by means of a public disclosure or labeling requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction." 5 C.F.R. 1320.7(q).

[5] The OSH Act prescribes a special requirement for such standards, stating (29 U.S.C. 655(b)(5)):

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

of Labor's efforts to promulgate a comprehensive hazard communication standard, pursuant to the OSH Act, for the purpose of "ensur[ing] that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees" (29 C.F.R. 1900.1200(a)(1)). The question is whether the Secretary's hazard communication standard is subject to OMB review in accordance with the PRA.

The Secretary first published a hazard communication standard in 1983. That standard, which was limited to the manufacturing sector of the economy, required covered employers to inform their employees of all hazardous substances to which they are exposed in the workplace through the use of container labels, material safety data sheets (MSDSs), and employee training programs. See 29 C.F.R. 1910.1200(a)(2) (1984); 48 Fed. Reg. 53,280 (1983). OMB reviewed and approved the standard's collection of information requirements (*ibid.*). A number of states and employee interest groups objected to the standard on various other grounds and sought judicial review.[6]

The court of appeals rejected most of the challenges to the Secretary's hazard communication standard. See *United Steelworkers of America* v. *Auchter (USWA I)*, 763 F.2d 728 (3d Cir. 1985). The court disagreed, however, with the Secretary's decision to limit the standard's coverage to the manufacturing sector. The Secretary had explained that he was limiting the standard's coverage based on his determination "to first regulate those industries with the greatest demonstrated need" (48 Fed. Reg. at 53,286). The court concluded, however, that there was record evidence justifying extension of the standard to

[6] The OSH Act specially provides for judicial review of occupational safety and health standards in the court of appeals, and it further provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U.S.C. 655(f).

the non-manufacturing sectors. It therefore directed the Secretary:

> to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible.

USWA I, 763 F.2d at 736-738, 739.

In response to the court's order, the Secretary reopened the record to gather additional evidence about the economic and technological feasibility of applying the hazard communication standard to non-manufacturing industries. See 50 Fed. Reg. 48,794 (1985). Based on this newly acquired evidence and on the previous rulemaking record, the Secretary commenced drafting a proposed rule that he expected to publish for notice and comment followed by promulgation of a final rule in early 1988. See 52 Fed. Reg. 31,852, 31,854 (1987). Certain parties to the *USWA I* litigation objected to the new rulemaking and moved the court of appeals to hold the Assistant Secretary in contempt for failing to revise the hazard communication standard based on the existing administrative record. The court of appeals agreed that the regulatory revision should be based on the existing record and directed, under threat of contempt sanctions, that the Secretary:

> within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible.

United Steelworkers of America v. *Pendergrass* (*USWA II*), 819 F.2d 1263, 1270 (3d Cir. 1987) (footnote omitted).

Although the federal government disagreed with that ruling, the Solicitor General, after rehearing was denied, determined not to file a petition for a writ of certiorari.

On August 24, 1987, the Secretary complied with the court's order and issued a final revised hazard communication standard covering both the manufacturing and the non-manufacturing sectors of the economy (29 C.F.R. 1910.1200). See 52 Fed. Reg. 31,852 (1987). In addition to the extended coverage, the revised standard included several modifications to the original standard designed to make the standard more suitable to the non-manufacturing sectors. *Id.* at 31,860.[7] Shortly thereafter, OMB held a public hearing, pursuant to the PRA, to solicit comments on the recordkeeping, notification, and other paperwork requirements of the revised standard. See 52 Fed. Reg. 36,652 (1987). On October 23, OMB notified the Department of Labor that it disapproved three particular provisions that the Secretary had added to the standard. App., *infra*, 22a-44a. It specifically disapproved: (1) "the requirement that [MSDSs] be provided on multi-employer worksites" either through the exchange

[7] Broadly speaking, the standard requires chemical manufacturers and importers to develop hazard information, label their chemical containers, and send material safety data sheets (MSDSs) to downstream manufacturing and non-manufacturing customers (29 C.F.R. 1900.1200(d), (f), (g)). Furthermore, the standard requires manufacturing and non-manufacturing employers: (1) to prepare a written hazard communication program that describes the employer's general compliance plan and contains a list of the hazardous chemicals used in the workplace; (2) to ensure that labels remain affixed on the containers and that when hazardous chemicals are transferred to new containers, those containers are also labelled properly; and (3) to maintain the MSDSs and make them readily accessible to employees in their work areas (29 C.F.R. 1910.1200((e), (f), (g)). In addition, employers must provide information and training to their employees with respect to the requirements of the standard and the chemical hazards present in the workplace (29 C.F.R. 1910.1200(h)).

of MSDSs among employers or their maintenance at a central location at the worksite; (2) "coverage of any consumer product excluded from the definition of 'hazardous chemical' under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986" (*i.e.*, "any substance packaged in the same form and concentration as a consumer product whether or not it is used for the same purpose as the consumer product" (App., *infra*, 36a)); and (3) "coverage of any drugs regulated by [the Food and Drug Administration] in the non-manufacturing sector" including those not sold in solid, final form. App., *infra*, 25a, 43a. See 52 Fed. Reg. 46,076 (1987); 29 C.F.R. 1910.1200(b)(6)(vii), (b)(6)(viii), and (e)(2)(i) (1987).

OMB's disapproval of the first requirement was based on its determination that the options provided for either mandatory exchange of potentially huge numbers of MSDSs at the worksite or depositing this information at a central location on the worksite (as opposed to a requirement that they be made available upon request) would impose substantial paperwork requirements but would have little, if any, practical utility. See App., *infra*, 30a-33a. As for the other disapprovals, OMB concluded, among other matters, that the disclosures mandated by those provisions would be inconsistent with related EPA requirements (for consumer products) and would substantially duplicate disclosures already required by the FDA (for drugs). See *id.* at 33a-38a. OMB instructed the Secretary "to revise these requirements * * * or collect new information that would warrant a reconsideration of our decision" (*id.* at 26a).[8]

[8] On January 14, 1988, the Department of Labor notified OMB that it would initiate a new rulemaking, but further explained that it would not be possible to complete the rulemaking by March 1, 1988, the date specified by OMB. App., *infra*, 45a-48a. In early March, the Department of Labor requested that OMB renew its 1983 approval of the hazard communication standard's paperwork requirements. On April 13, 1988, OMB approved all of the hazard communication standard's paperwork requirements except the three previously disapproved provisions. *Id.* at 49a-58a. The Department of Labor subsequently solicited public comment and has held hearings on what modifications (if any) should be made in light of OMB's disapproval. See 53 Fed. Reg. 29,822 (1988).

The organizations representing employee interests in *USWA I* and *USWA II* returned once again to the court of appeals and requested that court to hold the Secretary and the Director of OMB (who was not a party to the previous litigation) in contempt. They argued that the Secretary violated the earlier orders when she acceded to OMB's review and disapproval of portions of the standard and, more fundamentally, that OMB lacked authority under the PRA to disapprove the pertinent provisions of the hazard communication standard. The court of appeals, while declining to hold the Secretary or the Director in contempt, agreed with the attack on OMB's authority and invalidated the disapproval, in effect restoring the standard to the form promulgated by the Secretary. *United Steelworkers of America* v. *Pendergrass* (*USWA III*), App., *infra*, 1a-13a. The court recognized that the PRA authorizes OMB to determine "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3504(c)(2)). See App., *infra*, 7a. It held, however, that the pertinent provisions of the hazard communication standard "are insulated from OMB authority" (*id.* at 8a) because they do not "require the 'collection of information' " (*ibid.*) and they "embod[y] substantive policy decision making entrusted to [the Secretary of Labor]" (*ibid.*).

The court of appeals first reasoned that the two provisions dealing with consumer products and drugs are "*exemptions* from the labeling requirements of the hazard communication standard" (App., *infra*, 9a (emphasis in

original)) and that "[w]hatever else the terms 'collection of information' or 'information collection requests' may refer to, they cannot possibly refer to these exemptions from labeling requirements" (*ibid.*). The court then concluded that the disapproved provision dealing with information exchange at multi-employer worksites does not involve a "collection of information" because it "requires employers, not to compile, but simply to transmit information to covered employees" (*ibid.*). The court stated that "[t]he exchange requirement no more constitutes the collection of information within the meaning of the [PRA] than do the requirements for preparation of MSDSs by chemical manufacturers or the requirement of preservation of MSDSs by single employers" (*id.* at 11a). The court added that its conclusion was "reinforced" by other language in the PRA that "disaffirms the intention to grant substantive lawmaking authority to OMB" (*ibid.*).

Having addressed the merits, the court of appeals then turned to the question whether the employee groups were entitled to challenge OMB's disapproval through a contempt motion directed at the Secretary of Labor, rather than bringing an action for review of OMB's action pursuant to the Administrative Procedure Act. The court reasoned that the Secretary's withdrawal of the disapproved provisions was inconsistent with the court's prior orders and that relief by motion was therefore appropriate. App., *infra*, 12a-13a.

REASONS FOR GRANTING THE PETITION

The Secretary of Labor proceeded in strict conformity with the PRA, OMB's regulations, and established government practices by submitting the hazard communication standard for OMB paperwork review and by notifying the regulated parties that the three disapproved provisions would not go into effect. The court of appeals nevertheless

held that the Secretary's action was improper. The court's decision, which failed even to acknowledge OMB's controlling regulations, is extraordinary. Applied only to the specific agency action at issue here, it would have substantial consequences: it would eliminate OMB paperwork review of one of the most significant paperwork requirements in regulatory history. But still more troubling, the court's decision, if left standing, would effectively invalidate OMB's authority to review a wide range of other essentially indistinguishable agency information collection and dissemination activities. The court of appeals' decision is erroneous and is at odds with the reasoning of another court of appeals' decision addressing OMB's responsibilities under the PRA's predecessor statute—the Federal Reports Act of 1942, 44 U.S.C. 3501 *et seq.* (1976). Review by this Court is accordingly warranted.

1. OMB estimates that Americans spent nearly 2 billion hours in 1988 to meet federal information collection requirements. About one-eighth of that time, or 250 million hours, involved the collection and communication of information from one private party to another through federally mandated reporting or recordkeeping requirements.[9] OMB has consistently conducted a PRA review of such disclosure requirements to ensure that they are "necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508). As we have explained, OMB

[9] OMB regulations require an agency to include a determination of the number of hours of paperwork required by an information collection request when the agency proposal is submitted for OMB review. See 5 C.F.R. 1320.11(a). See also *Request for OMB Review*, Standard Form 83, Box 17. The 2 billion hour estimate is from the Information Collection Budget, which compiles figures for each proposal. The 250 million hour estimate is based on OMB's review of requests that involve disclosure requirements. The numbers of hours of paperwork cited below for specific regulatory initiatives are agency estimates submitted with the agencies' various proposals.

conducted a PRA review of the Secretary of Labor's original hazard communication standard (48 Fed. Reg. 53,280 (1983)), which imposed about 652,000 hours of paperwork. The Secretary of Labor estimates that the revised hazard communication standard, applicable to both the manufacturing and non-manufacturing sectors, would require about 54 million hours of paperwork in the first year alone. OMB has also reviewed, or is in the process of reviewing, numerous other substantially identical disclosure requirements. The more prominent examples include:

(a) Environmental Protection Agency (EPA) community right-to-know disclosures, which require compilation of information on chemical plant inventories and layout and transmittal of chemical information from plants to state and local governments. See 52 Fed. Reg. 38,344 (1987) (38.5 million hours);

(b) Federal Trade Commission (FTC) textile fiber products identification disclosures and fair packaging and labeling disclosures, which require labeling of basic information concerning the composition and contents of various merchandise. See 53 Fed. Reg. 5986 (1988); 53 Fed. Reg. 13,159 (1988) (29 million hours);

(c) Food and Drug Administration (FDA) nutrition labels, which require food manufacturers to label their products with ingredient information. See 52 Fed. Reg. 28,607 (1987) (4.8 million hours).

OMB has also reviewed, or is in the process of reviewing, federally mandated disclosures that require compilation and communication of information on pension benefits, subsidized housing inspections, hearing aids, lead-based paint, medical exams, medicated animal feeds, blasting at mines, airline on-time records, used car odometer totals, and funeral services, to mention a few.

The court of appeals' decision in this case expressly prohibits OMB from evaluating the operative provisions of the Secretary of Labor's hazard communication standard. That result, by itself, would substantially undermine Congress's goal of "minimizing the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons" (44 U.S.C. 3501(1)). But the court of appeals' decision would likely have the even more drastic result of preventing OMB review of other substantially identical disclosure requirements such as those listed above. The court of appeals held that the hazard communication standard was not subject to OMB review because federally mandated disclosure through on-site recordkeeping or labeling did not involve the collection of information. See App., *infra*, 8a-11a. That reasoning would also apply to each of those other disclosure provisions. Each requires, in whole or in part, that private parties disclose information to other private parties through reporting, recordkeeping, or labeling.

The threat to the efficacy of the PRA is both real and pressing because those disclosure requirements are generally imposed through the promulgation of regulations that have nationwide effect and because OMB reevaluates the paperwork burdens of those requirements, which typically affect significant portions of the American population, not less than every three years. See 5 C.F.R. 1320.13(i). The court's decision, if left uncorrected, would seriously disrupt OMB's established practice of conducting a PRA review of these types of disclosures in numerous regulatory spheres.

2. The court of appeals' decision not only would have far-reaching consequences, it is also incorrect. The Secretary of Labor and OMB agree that the hazard communication standard is subject to PRA review. OMB, the expert

agency charged with administering the PRA, has reasonably interpreted the statute as requiring review of these types of agency disclosure requirements. That review provides a centralized and objective assessment within the Executive Branch to assure that one agency's requirements do not duplicate the requirements of another and that the disclosure itself is necessary and will have practical utility. The court of appeals clearly erred in prohibiting PRA review.

We observe at the outset that the sole basis for the court of appeals' exercise of jurisdiction in this case was to determine whether the Secretary of Labor had complied with the court's previous order requiring the Secretary to extend a hazard communication standard to the non-manufacturing sector. The specific issue before the court was whether the Secretary had disobeyed the court's prior order by submitting the revised hazard communication standard to OMB for PRA review and then withdrawing the disapproved provisions. See App., *infra*, 12a-13a. We submit that nothing in the court of appeals' prior order foreclosed PRA revision of the expanded hazard communication standard, and accordingly there was no basis for respondents' contempt action.[10] The court rejected that reasoning and concluded that the Secretary acted inconsistently with the court's order because the PRA does not permit OMB

[10] Notably, the court's prior order did not expressly prohibit the Secretary from resubmitting the hazard communication standard for PRA review. See *USWA II*, 819 F.2d at 1270. The court's order, set forth at page 12, *supra*, makes no mention of the matter. Furthermore, the court presumably recognized that the previous hazard communication standard, applicable to the manufacturing sector, had received PRA review. See page 11, *supra*. It therefore should have come as no surprise to that court or any of the parties that the revised standard would receive PRA review as well. Thus, the court's order cannot

to review the hazard communication standard. However, both the court's method of analysis and its ultimate conclusion on this point are fundamentally flawed.

This Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), indicates that the question whether OMB has properly interpreted the PRA requires two subsidiary inquiries:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-843 (footnotes omitted). The court of appeals here did not inquire "whether Congress has directly spoken to the precise question at issue" or "whether the agency's answer is based on a permissible construction of the statute"; it "simply impose[d] its own construction on the statute" based on an exceedingly narrow view of the purpose of the PRA. See App., *infra*, 7a, 10a. If the court had conducted the *Chevron* inquiry, it would have reached a different result.

reasonably be construed as prohibiting the Secretary's action, and a challenge to the Secretary's action through a contempt proceeding is inappropriate.

The "precise question at issue" here is whether an agency requirement that employers communicate safety information to employees through the compilation and use of standard information forms (MSDSs), labeling, and written compliance plans, is an "information collection request" within the meaning of the PRA. The PRA statutory provisions that speak most directly to this question—the definitional provisions—indicate that it is. The PRA defines the term "information collection request" as a "written report form, application form, schedule, questionnaire, *reporting or recordkeeping requirement, collection of information requirement or other similar method calling for the collection of information*" (44 U.S.C. 3502(11) (Supp. IV 1986) (emphasis added). The PRA further defines the "collection of information" to include "the obtaining *or soliciting* of facts or opinions by an agency through the use of * * * *reporting or recordkeeping requirements or other similar methods*" (44 U.S.C. 3502(4) (emphasis added)). As OMB's regulations explain, the "soliciting of facts or opinions" can include an agency demand that persons "obtain, maintain, retain, report, or publicly disclose information" (5 C.F.R. 1320.7(c)). A reporting requirement can include an agency requirement that a person "provide information to another person" (5 C.F.R. 1320.7(s)), and a recordkeeping requirement can include a requirement "that information be maintained or retained by persons but not necessarily provided to the agency" (5 C.F.R. 1320.7(r)). Thus, an agency requirement that an employer communicate hazard information through compilation and maintenance of MSDSs, labeling, and written training programs can reasonably be viewed as the "soliciting of facts or opinions" through "reporting or recordkeeping requirements or other similar methods." [11]

[11] The hazard communication standard requires chemical manufacturers to develop MSDSs and to transmit them to downstream employers. The provision requiring that employers exchange or centrally maintain MSDSs at multi-employer worksites obviously is, in its own right, a recordkeeping requirement since it requires employers to gather and keep records at a specific site. The court's conclusion (App., *infra*, 9a) that this provision "requires employers, not to compile, but simply to transmit information" is facially incorrect. The court's conclusion (*ibid.*) that the PRA does not apply to the other two disapproved provisions because they are "exemptions from labeling requirements" is trebly mistaken. First, OMB did not simply disapprove the Secretary's exemptions; it determined that the scope of the hazard communication standard's coverage, even with those exemptions, was too broad. In any event, OMB is entitled to determine whether exemptions from paperwork burdens are sufficiently broad to ensure that the information that *is* collected is "necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508). Second, the provisions here do not involve simply "labeling" requirements; they specify whether certain consumer products and drugs are subject to the hazard communication standard's other information collection requirements as well. And third, labeling requirements in any case generally are reporting requirements subject to OMB review. See 5 C.F.R. 1320.7(c).

The PRA's definition of the terms "information collection request" and "collection of information" may not, by itself, compel OMB's conclusion that the hazard communication standard is subject to PRA review, but it strongly supports and certainly allows that conclusion. Where, as here, "the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K mart Corp.* v. *Cartier, Inc.*, No. 86-495 (May 31, 1988) slip op. 8. OMB's regulatory interpretation is also manifestly consistent with the PRA's objectives. The PRA's stated purpose is to minimize the public's paperwork burdens while maximizing the usefulness of information collected, maintained, or disseminated pursuant to federal requirements. 44 U.S.C. 3501.[12] These objectives

[12] The court of appeals erred in stating that the PRA is simply "aimed at reducing the burden of paperwork required by the federal

are equally relevant and important whether a federal agency requires persons to collect information and transmit it to the agency for subsequent dissemination, or whether the agency requires those persons to collect information and disseminate it to third persons. Cf. *Action Alliance of Senior Citizens* v. *Bowen,* 846 F.2d 1449, 1453 (D.C. Cir. 1988), petition for cert. pending, No. 88-849. OMB's regulations recognize this fact.[13]

The court of appeals' conclusion that the PRA does not give OMB "authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies" (App., *infra,* 10a) apparently resulted from the court's exclusive focus on Sections 3504(a) and 3518(e).[14] These provisions, however, must be read in harmony with Sections 3508 and 3518(a). Section 3508 specifically states that "the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the

government for its own regulatory or statistical purposes" (App., *infra,* 10a).

[13] See, *e.g.*, 5 C.F.R. 1320.7(c)(2) ("Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the 'collection of information' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency.").

[14] These provisions of the PRA state that the Director shall exercise his authority "consistent with applicable law" (44 U.S.C. 3504(a)) and that the statute shall not be interpreted "as increasing or decreasing the authority of the President, [OMB], or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices" (44 U.S.C. 3518(e)). See App., *infra,* 11a. These provisions simply recognize that an agency retains authority to determine its regulatory objectives, while OMB has a responsibility to review whether the agency has chosen effective information collection methods to *achieve* those objectives.

information will have practical utility" for the agency. 44 U.S.C. 3508. See also 44 U.S.C. 3504(c). In addition, Section 3518 states that "[e]xcept as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities *is subject to* the authority conferred on the Director by this chapter." 44 U.S.C. 3518 (emphasis added). Thus, the PRA is quite explicit in allowing OMB to review the kinds of disclosure an agency needs to accomplish its substantive policies.[15]

The legislative history also supports OMB's exercise of its PRA review authority. The House Committee Report indicates that the PRA was intended to cover the types of disclosures involved here and that OMB is entitled to review an agency's method of accomplishing its substantive policies:

> [The Securities and Exchange Commission (SEC)] [s]trongly recommended that [the House bill] be amended to narrow the definition of "collection of information" to exclude reporting required in connection with statutorily-authorized regulatory, enforcement, or oversight efforts. SEC believes that the current Federal Reports Act definition is limited to collection for statistical purposes and does not authorize

[15] This case illustrates how the PRA was meant to work. The Secretary of Labor determined that the Department's regulations should assure that employees at multi-employer work-sites have access to hazard information concerning all of the hazards at the site. OMB's review was directed to whether the Secretary's method of providing that information—on-site exchange or centralized retention of MSDSs—would have practical utility. OMB disapproved the Secretary's method, but it suggested an alternative method to achieve the regulatory goal and it permitted the Secretary the opportunity for additional rulemaking to provide further information on why her method was necessary. Thus, OMB did not usurp the Secretary's substantive policymaking function.

review of disclosure- or enforcement-related information gathering.

The Committee agrees with * * * SEC as to the close relationship between policy making and information management. However, regulatory agencies in the executive branch, such as EPA, have been able to justify to OMB their need for information used to establish policy or for other purposes. The independent regulatory agencies should also be capable of doing so. * * *. The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements.

H.R. Rep. No. 835, 96th Cong., 2d Sess. 23 (1980). The subsequent Senate Report made the same point:

Information is also collected to form the basis for disclosure to the public. For example, documents filed with the Securities and Exchange Commission by issuers of securities and by other persons subject to the Federal securities laws are designed for use by persons making investment and other financial decisions. In this connection, Federally-mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purposes of the Federal securities laws. Therefore in considering whether information will have practical utility, the Director should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction.

S. Rep. No. 930, 96th Cong., 2d Sess. 39-40 (1980).[16]

In sum, OMB's conclusion that the disclosure involved here is subject to PRA review, if not clearly required by the PRA, is at the very least "based on a permissible constructon of the statute." *Chevron U.S.A. Inc.*, 467 U.S. at 843. The court of appeals clearly erred in substituting its own construction of the statute.

3. The court of appeals' decision in this case rests on a view of the PRA that is at odds with *Action Alliance of Senior Citizens* v. *Bowen, supra.* In that case, the District of Columbia Circuit held that the PRA's statutory predecessor, the Federal Reports Act, authorized OMB to review an agency regulation requiring federal funds recipients to conduct a "self-evaluation" to determine whether they were in compliance with the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.* The court characterized as "pure pettifoggery" (846 F.2d at 1453) the claim that the Federal Reports Act applies only when the agency requires that information must be submitted to the government. It added (*id.* at 1453-1454):

OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term "collection of information" for nearly half a century to encompass "[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are to be used *or be available for use* in the collection of information." Regulation A, Federal Reporting Serv-

[16] Congress has amended and reenacted the PRA since OMB's 1983 promulgation of the regulations involved here. See Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341 (1986). Congress gave no indication that it disagreed with OMB's interpretation. Congress's failure to criticize or overrule the agency's regulations provides an additional basis for inferring that OMB has correctly gauged Congress's intent. See, *e.g.*, *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

> ices, Clearance of Plans and Reports Forms, Title I(1)(e) (February 13, 1943) * * *. Even under the deference we owe the agency [citing *Chevron*], we doubt that we could uphold a view of the Reports Act that made physical delivery to an agency essential to the notion of "collection of information." Happily we confront no such oddity.

The court also rejected the argument that OMB's review encroached on the " 'substantive policies and programs' " of other agencies (846 F.2d at 1454, quoting 44 U.S.C. 3518(e)).

The Third Circuit attempted to distinguish *Action Alliance* on the ground that it involved "compilation but not transmission of information" (App., *infra*, 9a). In the court's view, the "multi-employer MSDS exchange provision requires employers, not to compile, but simply to transmit information to covered employees" (*ibid.*). But as we have explained (note 11, *supra*), the MSDS exchange provision plainly requires the employer to "compile" information at a particular location. Thus, the Third Circuit and the D.C. Circuit, faced with similar facts, applied divergent reasoning and reached inconsistent results. Since the court of appeals' decision in the present case interpreted the PRA, while the D.C. Circuit's decision in *Action Alliance* interpreted the Federal Reports Act, the two decisions are not in square conflict. But even that distinction is largely technical since the PRA was intended to clarify the broad coverage of the Federal Reports Act. See pages 25-26, *supra*. In any event, the fact that parties may generally challenge OMB review of any nationwide rule in the federal circuit of their choice—and may therefore direct future cases to the Third Circuit—counsels against this Court's awaiting further developments in the courts of appeals before addressing the important question presented in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 83-3554, 83-3561, 83-3565, 84-3066, 84-3093 and 84-3128

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

AND

THE STATE OF NEW YORK, THE STATE OF NEW JERSEY, THE STATE OF CONNECTICUT AND NATIONAL PAINT & COATINGS ASSOCIATION, INTERVENORS

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

AND

THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE & ATLANTIC RICHFIELD COMPANY, AND NATIONAL PAINT & COATINGS ASSOCIATION, INTERVENORS

PUBLIC CITIZEN, INC., ET AL., PETITIONERS

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

AND

THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS ASSOCIATION, NATIONAL PAINT & COATINGS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE & ATLANTIC RICHFIELD COMPANY, INTERVENORS

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, AND RAYMOND DONOVAN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

THE STATE OF NEW YORK, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

Submitted Under Third Circuit Rule 12(6)
Aug. 5, 1988

Decided Aug. 19, 1988

OPINION OF THE COURT

Before GIBBONS, Chief Judge, and FISHER,* and KELLY,** District Judges.

GIBBONS, Chief Judge.

I

Once again United Steelworkers of America and Public Citizen, Inc. *et al.*, (petitioners) come before this court on a motion seeking further relief in the enforcement of our judgment in *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir.1985) (USWA I), issued on July 8, 1985. In USWA I we directed the Secretary of Labor to reconsider the application of the hazard communication standard promulgated pursuant to section 6 of the Occupational Safety and Health Act of 1970 (OSH Act), Pub.L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1982), to employees in sectors of the economy other than manufacturing. 763 F.2d at 743. The Secretary took the position that this judgment permitted the commencement of an entirely new rulemaking proceeding. The petitioners, contending that the Secretary was not in good faith complying with our judgment,

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* Hon. Clarkson S. Fisher, United States District Court Judge for the District of New Jersey, sitting by designation.

** Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

moved for further relief. In *United Steelworkers of America v. Pendergrass,* 819 F.2d 1263 (3d Cir.1987) (USWA II) we held that by commencing a new rulemaking proceeding the Secretary was not complying with our previous judgment. We directed that the Secretary should,

> within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered by the hazrd communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible. Such statement of reasons will be supplied separately as to each category of excluded workers.

819 F.2d at 1270. (Footnote omitted). On August 7, 1987 this court denied the Secretary's petition for rehearing and motion for a stay.

On August 24, 1987 the Occupational Safety and Health Administration (OSHA or the Secretary) published an expanded hazard communication standard applicable to all industries. 52 Fed.Reg. 31852, *et seq.* (codified at 29 C.F.R. § 1910.1200). This August 24, 1987 promulgation includes an OSHA finding that the rulemaking record on the whole supported a determination that the hazard communication standard is feasible in all industries. 52 Fed.Reg. at 31857. It applies the hazard communication standard to employers in all economic sectors, including the labeling requirements, as well as the requirement that covered employers make available for employee inspection Material Safety Data Sheets (MSDS) furnished by the manufacturers of hazardous chemicals used in the workplace, and the requirement that employees be provided with information and training on hazardous chemicals used in

their work area. The August 24, 1987 promulgation also includes three provisions not contained in the original hazard communication standard applicable in the manufacturing sector alone. These are: (1) a requirement that at multi-employer work-sites employers exchange their MSDSs, either individually or through a central location, 29 C.F.R. § 1910.1200(e)(2); (2) an exemption from the labeling requirement for consumer products used in the same manner and quantities as intended for consumer use, 29 C.F.R. § 1910.1200(b)(6)(vii); and (3) an exemption from labeling of drugs in tablet or pill form regulated by the Federal Drug Administration. 29 C.F.R. § 1910.1200(b)(6)(viii). OSHA explained that these modifications were made "to ensure that [the] provisions [of the standard] are practical and effective in communicating hazards to all workers" and in recognition of "the unique characteristics of some businesses [that] render certain provisions of the [previous] standard unnecessary or ineffective in communicating the hazards of chemicals to workers." 52 Fed.Reg. at 31858.

This revised hazard communication standard was to go into effect on May 23, 1988. 29 C.F.R. § 1910.1200(j). On September 10, 1987, however, OSHA submitted it to the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB), ostensibly in compliance with the Paperwork Reduction Act of 1980, Pub.L. 96-511, 94 Stat. 2812, 44 U.S.C. § 3501 *et seq.* (Supp.1988). On September 30, 1987 OMB undertook public notice and comment "on the recordkeeping, notification and other paperwork requirements" of the revised standard. 52 Fed.Reg. 36652. Following a public hearing, OMB purported to disapprove the three new provisions referred to in the preceding paragraph. OMB also conditioned its approval of the entire standard on the

undertaking by OSHA of further rulemaking to consider OMB's objections. OMB letter of October 23, 1987. Further negotiations between OSHA and OMB followed, and on April 13, 1988 OMB announced that it would permit the revised standard, but without the "disapproved" portions, to go into effect on May 23, 1988 as scheduled.

Meanwhile, two court proceedings regarding the revised standard were initiated. First, Associated Builders & Contractors, Inc. petitioned to review the revised hazard communication standard in the United States Court of Appeals for the District of Columbia, and moved for a stay of its enforcement in the construction industry. *Associated Builders & Contractors, Inc. v. McLaughlin*, (D.C.Cir. No. 87-1582). That court, on motion of the petitioners, transferred the Associated Builders & Contractors, Inc. petition to this court, but granted an administrative stay "until such time as the third circuit rules on the emergency motion for stay." Order of May 20, 1988. This panel has by a separate order denied that emergency motion.

Second, on April 6, 1988 the petitioners moved in this court for further relief. The effect of the April 13 OMB change of position, allowing the bulk of the hazard communication standard to go into effect, is that the petitioners' charge of non-compliance is now narrowed to the three provisions which OSHA has in effect withdrawn, in compliance with the OMB disapproval.

Both Associated General Contractors of America, and United Technologies Corporation moved in this court to intervene for the purpose of opposing the petitioners' motion for further relief.

II

In this matter of first impression we are called upon to consider the extent to which the Paperwork Reduction Act of 1980 authorizes the OMB to substitute its judgment for

that of OSHA with respect to the appropriate communication of hazards in the workplace necessary for compliance with section 6 of the OSH Act. Housed in Chapter 35 of Title 44 of the United States Code, which deals generally with "Public Printing and Documents," the Paperwork Reduction Act is the successor to the Federal Reports Act of 1942, previously codified in that Chapter. To generalize, the purpose of the Federal Reports Act was to coordinate the information collection activities of federal agencies, thereby reducing the cost of those activities to the government and to business and individuals required to file reports. The Paperwork Reduction Act of 1980 moved that function from the Director of the Bureau of the Budget to a new Office of Information and Regulatory Affairs in the Office of Management and Budget.

The Paperwork Reduction Act authorizes OMB to:

> (1) review[] and approv[e] information collection requests proposed by agencies;
>
> (2) determin[e] whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;
>
> . . . .

44 U.S.C. § 3504(c)(1) and (2). The "information collection requests" referred to in section 3504(c)(1) are defined in section 3502(11) as "written report form[s], application form[s], schedule[s], questionnaire[s], reporting or record-keeping requirement[s], collection of information requirement[s], or similar method[s] calling for the collection of information." This "collection of information" referred to in section 3504(c)(2) is defined in section 3502(4) as:

> the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting

or recordkeeping requirements, or other similar methods calling for either –

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes;

. . . .

44 U.S.C. § 3502(4)(A) and (B). Assuming that the information in issue falls within the Paperwork Reduction Act of 1980, OMB's regulatory authority over it is specifically limited by two provisions of that Act. First, OMB's authority "shall be exercised consistent with applicable law." 44 U.S.C. § 3504(a). Second, the Act provides:

> Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any federal agency to enforce the civil rights laws.

44 U.S.C. § 3518(e). Thus any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either, (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

As we noted above, OMB disapproved of three provisions of the revised hazard communication standard, each

of which was a departure from the standard which OSHA first imposed on employers in the manufacturing sector. Two of those departures are *exemptions* from the labeling requirements of the hazard communication standard. Thus, the revised standard exempts from its coverage (1) consumer products subject to labeling requirements under the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.*, and the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.*, and (2) drugs subject to the labeling requirements of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, 29 C.F.R. § 1910.1200(b)(6)(vii) and (viii).

Whatever else the terms "collection of information" or "information collection requests" may refer to, they cannot possibly refer to these exemptions from labeling requirements which would otherwise have been duplicative of the labeling requirements imposed in the interest of health and safety by other federal regulatory agencies. What is left for consideration is the requirement that employers on multi-employer worksites exchange MSDSs, imposed for the first time in the August 24, 1987 promulgation. 29 C.F.R. § 1910.1200(e)(2). We note initially that we are not presented with the question whether the Paperwork Reduction Act of 1980 applies when the federal government requires from non-governmental parties, for its own purposes, compilation but not transmission of information. See *Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, 846 F.2d 1449 (D.C.Cir.1988). The multi-employer MSDS exchange provision requires employers, not to compile, but simply to transmit information to covered employees. The sole question it presents is whether that requirement can be said to involve either the "collection of information" or an "information collection request" within the meaning of the Paperwork Reduction Act.

In USWA I we discussed in detail the development by OSHA of the hazard communication standard. We noted that it imposed on chemical manufacturers the obligation to label containers and to furnish to downstream users MSDSs containing chemical common names of each hazardous ingredient, and information necessary for safe use of the product. 763 F.2d at 732. Although the issue was not raised in USWA I, implicit in OSHA's standard, and in this court's approval of it, is the holding that imposing this obligation on chemical manufacturers is an appropriate safeguard for workers in the workplace, as required by section 6 of the OSH Act. The same must be said for the obligation imposed on downstream employers to make MSDSs available to their employees. *Id.* at 733. In one sense the standard requires chemical manufacturers to collect and transmit information, and employers to collect and maintain information. It would be a far-fetched interpretation of the Paperwork Reduction Act of 1980, however, to hold that these activities fell within its coverage. The Act, historically, is a successor to the Federal Reports Act, and like the latter, it is aimed at reducing the burden of paperwork required by the federal government for its own regulatory or statistical purposes. The preparation and preservation of MSDSs in the workplace have entirely different purposes. The object of these information disclosure requirements, in accordance with the OSH Act, is to increase workplace awareness of hazards, thereby enabling workers to avoid injury, illness or death. Nothing in the Paperwork Reduction Act suggests a congressional intention to allow OMB, in the guise of regulating collection of information, the authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies.

OMB did not go so far as to disapprove the requirement that chemical manufacturers prepare and transmit MSDSs or the requirement that employers who purchase the chemicals make them available to their employees. It merely disapproved the requirement that on multi-employer work-sites the employers exchange the MSDSs. In USWA I we questioned the basis of the Secretary's failure to include the construction industry in the hazard communication standard. 763 F.2d at 738. That industry is now included, and the problem of multi-employer worksites is endemic to it. OSHA reasonably concluded that the protection of one trade from hazardous substances used by another on the same job-site required the exchange of the hazard information. The exchange requirement no more constitutes the collection of information within the meaning of the Paperwork Reduction Act of 1980 than do the requirements for preparation of MSDSs by chemical manufacturers or the requirement of preservation of MSDSs by single employers.

Our conclusion that the regulations disapproved by OMB do not involve the collection of information is reinforced by the statutory language which in two places disaffirms the intention to grant substantive lawmaking authority to OMB. 44 U.S.C. §§ 3504(a); 3518(e). Clearly, OMB cannot in the guise of reducing paperwork substitute its judgment for that of the agency having substantive rulemaking responsibility for such matters as drug or food labeling, drug package inserts, proxy statement disclosures, or the contents of registration statements. No substantive distinction between such disclosure requirements and the OSHA disclosure requirements disapproved by OMB in this instance is readily apparent.

III

OSHA and United Technologies, as intervenor, contend that we should nevertheless deny the petitioners' motion for additional relief. They contend that the petition should be construed as a challenge to OMB agency action under the Paperwork Reduction Act of 1980, cognizable only in a suit in a federal district court pursuant to the Administrative Procedure Act. 5 U.S.C. § 703. Alternatively they contend that because the three provisions which OMB disapproved were added to the hazard communication standard they do not involve our prior mandate, and can only be reviewed in a new challenge to OSHA rulemaking. We reject both contentions.

In USWA I we directed OSHA to reconsider the application of the hazard communication standard to employees in sectors of the economy other than manufacturing unless the Secretary could state reasons why such application would not be feasible. 763 F.2d at 739 (citing 29 U.S.C. § 655(b)(5)). In USWA II we made it clear that our first judgment required that feasibility be determined for each category of worker on the basis of the administrative record already compiled. 819 F.2d at 1270. Thus, our prior orders represent our considered view that OSHA must cease abdicating its responsibility with respect to employees outside the manufacturing sector, by deciding whether or not they should be covered on the basis of the record. The August 24, 1987 promulgation of a hazard communication standard applicable to all employees was a good faith compliance with those orders. The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed. *Cf. Action Alliance*, 846 F.2d at 1455 (new round of rulemaking not required for a revision that is the "logical outgrowth" of the rulemaking record). Withdrawal of the provisions disapproved by OMB was accordingly inconsistent with those orders. Relief by motion is appropriate. 28 U.S.C. § 1651(a) (1982); 5 U.S.C. § 706(1) (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977); *USWA II*, 819 F.2d at 1270.

IV

This panel has denied the motion by Associated Builders & Contractors, Inc. for a stay of the hazard communication standard. That motion was made in connection with a petition for review filed in the Court of Appeals for the District of Columbia, and transferred here. This petition appears to be an attempt to relitigate issues settled in our decisions in *USWA I* and *USWA II*. Since, however, briefing on that petition has not been completed we will not rule finally on it at this time. The clerk will be directed to issue a briefing schedule, and, when briefing is complete, to assign the petition to a panel for disposition.

V

The Secretary shall forthwith publish in the Federal Register a notice that those parts of the August 24, 1987 hazard communication standard which were disapproved by OMB are now effective. Because the instant dispute arose as the result of another federal agency's attempt to exceed its statutory authority, we will deny at this time the petitioners' motion to hold the respondent officials of the Department of Labor in contempt.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-3554

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT
AND
THE STATE OF NEW YORK, THE STATE OF NEW JERSEY, THE STATE OF CONNECTICUT AND NATIONAL PAINT & COATINGS ASSOCIATION, INTERVENORS

No. 83-3561

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT
AND
THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE & ATLANTIC RICHFIELD COMPANY, AND NATIONAL PAINT & COATINGS ASSOCIATION, INTERVENORS

No. 83-3565

PUBLIC CITIZEN, INC., ET AL., PETITIONERS

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT
AND
THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS ASSOCIATION, NATIONAL PAINT & COATINGS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE & ATLANTIC RICHFIELD COMPANY, INTERVENORS

No. 84-3066

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

No. 84-3093

PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR AND RAYMOND DONOVAN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

No. 84-3128

THE STATE OF NEW YORK, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

ON PETITION FOR REVIEW FOR FURTHER RELIEF WITH RESPECT TO PRIOR DECISIONS OF THIS COURT

Present: GIBBONS, Chief Judge, and FISHER*, and KELLY**, District Judges

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[Filed Aug. 19, 1988]

ORDER

These causes came to be heard on the record from the Occupational Safety and Health Administration of the United States Department of Labor, and were submitted under Third Circuit Rule 12(6) August 5, 1988, in regard to the motion seeking further relief in the enforcement of this Court's Judgment in *United Steelworkers of America v. Auchter,* 763 F.2d 728 (3d Cir. 1985).

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* Hon. Clarkson S. Fisher, United States District Court Judge for the District of New Jersey, sitting by designation.

** Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the Secretary shall forthwith publish in the Federal Register a notice that those parts of the August 24, 1987, hazard communication standard which were disapproved by the Office of Management and Budget (OMB) are now effective. It is further ordered and adjudged that the petitioners' motion to hold the respondent officials of the Department of Labor in contempt is denied since the instant dispute arose as the result of another federal agency's attempt to exceed its statutory authority. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS
Clerk

August 19, 1988

Certified as a true copy and issued in lieu of a formal mandate on January 30, 1989.

Test: /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-3554, 83-3562 & 83-3565
84-3066, 84-3093 & 84-3128

UNITED STEELWORKERS OF AMERICA, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY
OF LABOR, ETC., RESPONDENT

PUBLIC CITIZEN, INC., ET AL., PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY
OF LABOR, ETC., RESPONDENT

SUR PETITION FOR REHEARING

[Filed Nov. 28, 1988]

Present: GIBBONS, Chief Judge, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges, FISHER and KELLY, District Judges*

The petition for rehearing filed by the respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and to all

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* As to panel rehearing only.

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

/s/ JOHN J. GIBBONS
Chief Judge

Dated: November 28, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-3554, 83-3562 & 83-3565
84-3066, 84-3093 & 84-3128

UNITED STEELWORKERS OF AMERICA, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC., RESPONDENT

PUBLIC CITIZEN, INC., ET AL., PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC., RESPONDENT

SUR PETITION FOR REHEARING

[Filed Nov. 28, 1988]

Present: GIBBONS, Chief Judge, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges, FISHER and KELLY, District Judges*

The petition for rehearing filed by the intervenor, United Technologies Corporation, in the above entitled case having been submitted to the judges who participated

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* As to panel rehearing only.

in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

/s/ JOHN J. GIBBONS
Chief Judge

Dated: November 28, 1988

APPENDIX E

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

[Seal]

Oct. 28, 1987

Honorable Thomas C. Komarek
Assistant Secretary for
Administration and Management
Department of Labor
Washington, D.C. 20210

Dear Tom:

Pursuant to the Paperwork Reduction Act (44 U.S.C. Chapter 35), we have completed our review of the collection of information requirements in the Occupational Safety and Health Administration's Hazard Communication Standard (HCS), which were submitted to us by your office on September 10, 1987. We notified the Department of our decision on October 23, 1987. This letter explains in greater detail our October 23rd decision and transmits the record of our October 16, 1987 public hearing on the HCS together with the written comments we have received.

As proposed by OSHA on March 19, 1982, and promulgated as a final rule on November 25, 1983, the HCS applied only to the manufacturing sector of the economy. Pursuant to a court order, OSHA promulgated on August 24, 1987 a new final HCS based on the record developed in response to the original proposal. This most recent final

rule differs substantially from the original proposal because it applies to the non-manufacturing sector as well.

On September 10, 1987, you submitted for the first time the paperwork provisions in the revised final rule for OMB review. Thus, you asked us to reinstate previously approved paperwork covering the manufacturing sector, for which OMB approval expired on June 30, 1987, and to approve an additional 28.7 million hours of new paperwork covering the non-manufacturing sector. In addition, we are asked to approve new paperwork for the manufacturing sector that apparently went into effect 30 days after publication of the new final rule, without approval under the Paperwork Reduction Act.

Our review of the paperwork provisions in the expanded standard has confirmed our support and earlier approval of the original Hazard Communication Standard in 1983, and our belief in its importance in reducing occupational illnesses and injuries by ensuring that workers are informed about the hazards of substances to which they may be exposed on the job. As OSHA has long recognized, however, this deceptively simple goal becomes exceedingly complicated when applied to millions of different worksites, work conditions, and products across the country. I commend the Department for continuing to adopt a performance-oriented approach to hazard communication that allows employers flexibility in complying with the rule, and for tailoring the expanded rule to adapt the flow of information more appropriately to some of these worksites and products.

Decision

Your request for OMB review of the HCS paperwork provisions has raised difficult issues. The Department promulgated a final rule under an order from the U.S. Court of Appeals for the Third Circuit, but failed to follow the approval procedures required in Section 3504(h) of the Paperwork Reduction Act. The explicit purpose of Section 3504(h) is to establish a mechanism to coordinate rulemakings and Paperwork Reduction Act reviews. Section 3504(h) allows OMB to disapprove any collection of information requirement where the agency has substantially modified in the final rule the collection of information requirement in the proposed rule if the agency has not submitted the modified requirement to OMB for review at least 60 days prior to issuance of the final rule. These procedures for prior review are intended to avoid the difficult situation in which, after rulemakings are completed, further rulemaking may be necessary if we cannot approve the paperwork components of the rule. The Department's failure to comply with these procedures prior to publication is particularly unfortunate given the Third Circuit's concern that the final rule not be further delayed. In the course of our review, we have carefully weighed our obligations under the Paperwork Reduction Act and the concern of the court that the final standard should take effect without unreasonable delay.

As you know, the Paperwork Reduction Act requires that agencies of the Federal government obtain OMB approval before conducting or sponsoring a collection of information. Under the Act and implementing regulations at 5 CFR 1320, we are required to determine that the paperwork requirements have practical utility, that they are the least burdensome necessary for the proper performance of

the agency's functions to comply with legal requirements and achieve program objectives, and that they do not duplicate information otherwise available. Section 3512 of the Act protects the public from penalties resulting from failure to comply with collection of information requirements that are not approved under the Act.

During our review of the HCS, we conducted public meetings on the proposed paperwork provisions on April 2, 1987, and October 16, 1987, and reviewed numerous written comments. We have carefully analyzed this record, which provides additional information and new perspectives on the record upon which OSHA based the expanded rule, and, as required by the Act, have based our decision upon it. We have determined that the record does not support certain paperwork provisions and would not allow approval. Hence, pursuant to Section 3504(h)(5)(D) of the Paperwork Reduction Act and 5 CFR 1320.13(g) of the implementing regulations, we have disapproved, effective May 23, 1988, the following collection of information requirements:

- the requirement that material safety data sheets be provided on multi-employer worksites;

- coverage of any consumer product excluded from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986;

- coverage of any drugs regulated by FDA in the non-manufacturing sector.

Our disapproval takes effect on May 23, 1988, the date on which the expanded standard takes effect for the non-

manufacturing sector. In the rulemaking required below, we believe the Department should take action under the Administrative Procedures Act to revise these requirements prior to the effective date (below, we suggest alternatives that may be consistent with the Paperwork Reduction Act) or collect new information that would warrant a reconsideration of our decision under the Paperwork Reduction Act.

We have approved all other paperwork requirements through May 23, 1988, but have determined that reconsideration of the definition of "article" is needed in order to achieve consistency with the Act. Therefore, pursuant to 1320.14(f) and (g) of the implementing regulations, we are instructing the Department to complete a rulemaking on this and other issues, including issuance of a notice of proposed rulemaking and a final rule. The rulemaking shall examine, at least, alternatives to the definition of "article," including a *de minimis* exemption and clarification of the concept of "normal use," and should conform the provisions of the rule relating to the manufacturing sector to the requirements in the non-manufacturing sector in light of this decision. In the course of this rulemaking, the Department shall comply with Section 3504(h) procedures to accommodate the needs of both the Administrative Procedures Act and the Paperwork Reduction Act. Our approval is conditioned on adherence to the following schedule for consideration of these paperwork provisions:

December 1, 1987: Publication in the *Federal Register* of a notice of proposed rulemaking to reconsider certain paperwork provisions of the HCS and submission of paperwork to OMB for review

January 31, 1988: Public comment period on NPRM closes

March 1, 1988: Publication in the *Federal Register* of a final rule concerning the HCS; paperwork submitted to OMB for review

Although this schedule is tight, it is very important that OSHA conclude its rulemaking to revise the standard, giving OMB sufficient time to complete review of the final paperwork provisions and the public sufficient time to understand and implement the revisions prior to the effective date of the standard.

Generic Hazard Communication Programs

Many commenters spoke forcefully about widespread confusion in the regulated community, particularly among small businesses, regarding their responsibilities under the HCS. Some, for example, were unsure who would be responsible for the accuracy of the MSDS information—the generator or the downstream user (1-24). Others stated that a certification or technical assistance effort was needed to give employers confidence that their efforts were in compliance with the HCS. Still others mentioned that the Federal Government had developed a Federal Generic Hazard Communication program, which contains step-by-step instructions for implementing the HCS, a model written program, and an HCS training program, in order to reduce Federal agency costs in complying with the HCS, and that a similar approach may be useful for the private sector. In fact, the single issue on which every commenter who addressed the issue agreed was the need for some sort of non-mandatory guidance from OSHA on the develop-

ment of hazard communication programs (see e.g. comments by the Small Business Administration, the Organization of Resources Counselors, AFL-CIO, National Association of Home Builders, National LP-Gas Association, American Farm Bureau Federation, Associated General Contractors of America, Associated Builders and Contractors; National Association of Wholesaler-Distributors; Petroleum Marketers Association of America, National Automobile Dealers Association, National Paint and Coatings Association, and the American Subcontractors Association, Inc.).

These comments strongly suggest that administrative actions by OSHA could reduce the paperwork compliance burden associated with the information collection provisions. Although we do not have sufficient information to determine what administrative action would be most appropriate, we believe that OSHA should examine several options, while relying to the extent possible on the private sector. We believe OSHA should consider working with the appropriate public and private groups, as well as existing OSHA advisory groups, in developing a suitable approach. Options may include the development of a generic hazard communication program or guidelines suitable for the development of generic programs by the private sector and by States, which could perhaps be certified as meeting the requirements of the HCS. Certification of private sector generic programs would continue to encourage the private market to develop programs, while also offering the employer some guarantee that the program purchased meets OSHA's expectations for compliance. OSHA could also make available any generic guidelines that were developed to any employer wishing to design his or her own plan.

Such an administrative effort by OSHA could substantially reduce the start-up paperwork burden and costs of the HCS, particularly those of small businesses. The Small Business Administration, for example, estimated that a generic program could reduce first year program development costs by 50 percent and training costs by 25 percent, for a total first-year savings of $700 million (2-42). A generic program could also facilitate employer compliance at the earliest possible date and improve the effectiveness of programs that are developed. Although we do not believe that the Federal Government should compete with the private market that has already developed generic hazard communication programs, we believe that a great deal can be done within the boundaries of OSHA's limited resources either to supplement the private sector or to improve the usefulness of private sector programs.

By January 1, 1988, OSHA should submit a plan, which has been developed in consultation with the U.S. Small Business Administration and the Secretary of the Department of Commerce, for an administrative effort that would provide such assistance as appropriate to alleviate the start-up paperwork burdens and costs. The plan should include an outline of the intended approach and a timetable of actions necessary to complete the effort by the date of publication of the revised final rule and have it available to the regulated community. With the resubmission of the collection of information requirements in the final rule, OSHA should also submit a description of the plan and any documents necessary to implement it. We look forward to working with you to meet this condition of paperwork approval as efficiently and effectively as possible.

Discussion

Following is a discussion of the record and the reasons for our decisions under the Paperwork Reduction Act.[1]

Multi-Employer Workplaces

The HCS relies heavily on the encyclopedic Material Safety Data Sheet (MSDS) as the primary mechanism for transmitting hazard information to employers and employees. This approach is appropriate when workers face the likelihood of significant exposure to a relatively small number of chemical hazards. Other transmittal mechanisms, however, such as generalized hazard training, are likely to be equally or more effective with much less paperwork burden when the particular hazards are continually changing or when many potentially hazardous substances are present in small quantities. In such circumstances, MSDSs have little, if any, practical utility, because neither employers nor employees can predict what, where or when exposures are likely to occur or consult the MSDS before deciding how to handle the substance. Unfortunately, these are exactly the situations where the burden of maintaining and updating MSDSs would be heaviest.

The effectiveness and efficiency of the MSDS as a source of information in various situations is disputed by a number of commenters. For example, several commenters questioned the practical utility of the provision governing

[1] All exhibit numbers are references to OMB paperwork docket 1218-0072, which is available to the public in Room 3201, New Executive Office Building, Washington, D.C. The prefix "1" indicates that the exhibit was received in response to the April 2, 1987, public meeting, and the prefix "2" indicates that the exhibit was received in response to the October 16, 1987, public meeting.

multi-employer workplaces such as construction sites (1910.1200(e)(2)), which requires each employer to provide MSDSs at the workplace. The commenters stated that having the MSDS physically at the worksite would almost certainly be useless. They maintained that coordination and transfer of the MSDSs, either between employers or in a central location would be very difficult, primarily due to the numbers of employees and substances and the great frequency with which employees would arrive at and leave the site (Ex. 1-14, p. 85; 2-41; 2-48; 2-49). For example, some employees would be on-site for a few hours; others for months. Some employees would arrive directly from another worksite rather than from a central location. Other commenters (Ex. 1-14, p. 94) expressed doubt as to the need to have MSDSs actually on the site if they were available elsewhere or if the information were available by phone or computer, an approach that the HCS permits for employees of a single employer who work at multiple locations (1910.1200(g)(9)). Similar problems were described by commenters with regard to mobile service personnel, such as repairmen, and professional launderers.

These commenters also questioned OSHA's estimates of the number of MSDSs required in multi-employer workplaces. One commenter estimated that a single industrial launderer might need to keep on file 10,000 to 50,000 MSDSs (Ex. 2-17) because delivery personnel could be exposed to different hazards at each location where they pick up or deliver laundry. The commenter estimated that the annual costs of compliance would be far higher than OSHA's estimated second-year cost of $16 per establishment. Another commenter stated that it would not be feasible for a mobile service employee to have hard copies of MSDSs for all hazardous chemicals in the vehicle (Ex. 2-13). Several representatives of the construction industry

estimated that a minimum of several file cabinets would be required on a construction site to maintain the MSDSs, and that compliance may be physically impossible (see, for example, comments by Associated General Contractors of America, 2-29; and Associated Builders and Contractors, 2-30).

In light of these objections, neither the preamble to the final rule nor the justification statement in the request for OMB paperwork review demonstrate the practical utility for the requirement to bring MSDSs on-site at multi-employer workplaces. Moreover, the requirement does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces. Hence, the requirement to bring MSDSs onto multi-employer worksites is disapproved effective May 23, 1988.

One approach that would be consistent with the Paperwork Reduction Act would be the addition of a third option to paragraph (e)(2)(i), in addition to the option of trading MSDSs between employers or depositing them in a central location. This third option would require employers at multi-employer worksites to keep labels intact on any containers they bring onto the worksite; to train their employees in the hazards with which they work directly, in recognition of and response to the general hazards that are likely to be introduced by other employers, and in the need to observe hazard labels on the worksite and request MSDSs when further information is needed; and to provide MSDSs to other employers upon request. Given the high rate of turnover in affected industries, such training should be transferable from worksite to worksite (Exs. 1-15, 2-21, 2-30).

This approach would ensure that all employees at a worksite would have access to all MSDSs upon request. This approach relies on labels and general hazard training to protect workers from substances brought onsite by other employers. It also leaves intact OSHA's existing requirement at (e)(2)(ii) that employers inform other employers of any precautionary measures that need to be taken to protect employees, and therefore ensures that workers are protected from unusual hazards at a multi-employer worksite, as well as the normal hazards that would be included in a generalized training program.

Consumer Products

OSHA exempts from this final rule any consumer product where "the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers" (1910.1200(b)(6)(vii)). This is a new exemption not contained in the existing rule, and is appropriately intended to exclude the large numbers of consumer products found in non-manufacturing workplaces. Nonetheless, this exemption is limited to consumer products that are used under certain circumstances, and hence the HCS would continue to apply to numerous consumer products present in workplaces.

The record indicates that this exemption would continue to place under the HCS large numbers of consumer products for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial. We have four major concerns:

- Consumer product labeling already provides information to identify significant hazards that may result from

use of the product and to enable users to avoid those hazards. For the overwhelming majority of consumer products that would remain subject to the standard, there is no evidence in the record that the MSDS would have practical utility beyond the information already included on the label.

- The exemption imposes a burden on the employer to "demonstrate" that exposures for each substance are the same as "normal consumer use," a burden that may be difficult to meet (2-44). More importantly, such a trigger would not exclude many situations where risks are very low. For example, is an employee who cleans and waxes floors once a week using a supermarket product exposed at the same duration and frequency as consumers? If not, should the employee be trained in the hazards of floor wax? Under OSHA's language, the employee may well be treated exactly like a worker on a chemical production line. In addition, the HCS requires that even consumer products that are not opened under normal workplace use, such as those a stock boy places on a supermarket shelf, be treated as "sealed containers," for which MSDSs and hazard training for potential spillage are required. This would result in treating a can of floor wax in a grocery store exactly the same as a 55-gallon drum of industrial chemical in a warehouse. In this regard, the National Retail Merchants Association stated, "It would be exceptionally difficult for retailers to adequately assess whether the hundreds of products they regularly sell could potentially become workplace hazards in the event of spillage" (Ex. 1-24, see also comments by the National Restaurant Association, 2-31).

- The exemption does not allow upstream suppliers to determine which products are exempted, because they

do not know how downstream employers will use them. Moreover, OSHA's explanation that downstream distributors who do not "generally" sell to employers would not be covered offers no relief to wholesalers and other consumer product distributors who have some accounts that are subject to the standard and others that are not. In fact upstream suppliers who want to ensure compliance will have no practical alternative but to assume that downstream employers are covered, and will therefore ship MSDSs and labels along with all consumer products. Thus, upstream suppliers will continue to bear all of the costs and the distribution/retail sector will continue to receive all of the hazard information for all consumer products. This is exactly what the consumer product exemption should be designed to avoid.

- The number of MSDSs involved is very large. Although OSHA estimated that the typical food store contained 11 chemical hazards and the largest 58, the Food Marketing Institute estimated that the typical supermarket would sell at least 1,200 nonfood consumer products that may be covered by the HCS (Ex. 2-32). The National Paint and Coatings Association calculated that paint manufacturers would be required to supply 7,000,000 MSDSs initially to retail establishments (Ex. 2-38).

We have therefore disapproved, effective May 23, 1988, coverage under the HCS of any consumer product excluded by Congress from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986 (SARA): "Any substance to the extent it is used for personal, family or household purposes, or is present in the same form and concentration as a product packaged for distribution and

use by the general public." This language would exempt any substance packaged in the same form and concentration as a consumer product whether or not it is used for the same purpose as the consumer product. EPA concluded in its final rule on Sections 311 and 312 of SARA (52 FR 38344) that this exemption is appropriate for household or consumer products in commercial and industrial as well as household use because "the public is generally familiar with such substances, their hazards and their likely locations, (hence) the disclosure of such substances is unnecessary for right-to-know purposes." This alternative consumer products exemption would address the concern that the current HCS imposes unnecessary paperwork in many situations in which exposures and risks are trivial, and would reduce and simplify the paper work requirements:

- It makes the OSHA and EPA right-to-know paperwork requirements, which are closely linked, mutually consistent. Using the same exemption in both rules avoids the situation in which employers must separate the paperwork for their "consumer products" into two groups: an OSHA "consumer product" and an EPA "consumer product."
- It establishes objective criteria that enable upstream and downstream employers to determine what is exempted and what is included. Upstream suppliers would not be forced to speculate as to the identity of the final user (consumer or employer?) in determining whether the product is subject to the HCS. The flow of MSDSs and labels would be restricted to unpackaged substances or substances packaged for industrial or commercial use, for which detailed hazard information would be expected to have practical utility.

Drugs Regulated by FDA

The standard exempts drugs in "solid, final form for direct administration to the patient (i.e., tablets or pills)." This exemption in part avoids duplication of paperwork. Drugs for human consumption are heavily regulated by the Food and Drug Administration, which requires the transmittal of detailed information downstream from the manufacturers through professional package inserts and labels. The exemption also limits the odd situation in which a drugstore owner would be responsible for training professional pharmacists about the hazards of the drugs they dispense.

Outside the manufacturing sector, however, both rationales are equally relevant to liquid drugs or drugs not in final form. OSHA does not explain why all drugs regulated by the FDA are not exempted, except to say that North Carolina has adopted a similar exemption. Yet the paperwork burdens of covering such drugs appear to be very high. The National Wholesale Druggists Association has estimated that *each* drug wholesaler with 400 pharmacy customers and 12,000 individual products covered by the HCS, would initially be required to distribute 4.8 million MSDSs (Ex. 2-24). If capsules containing solids or liquids are covered by the HCS, another 5,520 products would be added. A similar concern was raised by the Department of Agriculture (Ex. 2-50) and the Animal Health Institute (Ex. 2-40) concerning potential duplicative paperwork for veterinary biological products. Since coverage of any FDA-regulated drug would result in duplicative paperwork and is unlikely to provide additional information of any practical utility, we have disapproved coverage of FDA-regulated drugs outside the manufacturing sector, effective May 23, 1988.

Definition of "Article"

The HCS exemption of "articles" from the scope of the standard is conditionally approved through May 23, 1988. Although the record supports the need for an article exemption, the record does not support the existing definition of "article," particularly with regard to the lack of a *de minimis* exemption and the agency's interpretation of "normal conditions of use."

"Article" is defined as "a manufactured item: (1) which is formed to a specific shape or design during the manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result, in exposure to a hazardous chemical under normal conditions of use." OSHA explains in the preamble to the final expanded rule that "exposure" does not mean releases of "very small quantities," "a trace amount," or "a few molecules" of the hazard.

The issue raised in the record is whether an objective "de minimis" exemption should be added to the definition of "article," perhaps similar to the quantity threshold used to define "de minimis" quantities in mixtures. OSHA exempts from the HCS substances which comprise less than one percent of a mixture (0.1 percent if the substance is a carcinogen), unless "there is evidence that the ingredient(s) could be released from the mixture in concentrations which would exceed an established OSHA permissible exposure limit (PEL) or ACGIH Threshold Limit Value (TLV), or could present a health hazard to employees" (1910.1200(g)(2)(i)(C)(1) and (2)). The one percent exclusion was included in the HCS, OSHA explained in the preamble to the 1983 final rule, "to absolve the employer

from having to evaluate and list chemicals present in mixtures in small quantities, which are not likely to result in substantial exposures . . . the one percent cutoff was justified on the basis that it appeared to be protective and was considered to be reasonable by a number of affected parties" (48 FR 53290).

The record contains a number of statements that the absence of similar "de minimis" language in the definition of "article" results in the standard covering many items containing small amounts of hazardous substances and presenting low exposures to workers (one commenter noted that even the *Federal Register* volume in which the HCS was published emitted a measurable amount of formaldehyde, Ex. 1-25, see also Exs. 1-14, pp. 49-55; 2-36; 2-44). The lack of consistency betweeen mixtures and articles also poses the anomalous possibility that exempt substances in a liquid or powdered mixture will become subject to the HCS when shaped or incorporated into a solid article, although the possibility of employee exposure is almost surely reduced.

The evidence is convincing that the current definition of "article" would indeed result in the inclusion of many items that present trivial risks, and that OSHA's preamble discussion of the issue is insufficient to exclude those items. It is particularly compelling that OSHA has in essence included a "de minimis" exemption for mixtures, for reasons that appear to apply equally well to manufactured items. Hence, the current "article" exemption appears to include many items under the HCS for which the paperwork requirements would have no practical utility. We therefore believe that OSHA should reconsider the definition of article. An approach more consistent with the Paperwork Reduction Act would exclude de minimis

exposures expressly, and define such exposures in the same terms used in the exclusion for trace components of mixtures. This approach would result in a consistent treatment of solids and chemical mixtures under the standard by exempting many items that emit small amounts of potentially hazardous substances, but not in sufficient quantities to result in significant exposures. It may also result in lower exposures by encouraging manufacturers to reduce trace elements to below the threshold. The Department is instructed to complete by March 1, 1988 a rulemaking to reconsider a *de minimis* exemption in the definition of "article."

A related issue that appears to cause confusion in the regulated community is the coverage of items such as metal or plastic pipes. These objects would appear to be "articles" since they are formed to a specific shape or design, are dependent for their end-use function on their shape or design, and would not release or otherwise result in exposure to hazardous chemicals under normal conditions of use, that is, when functioning as pipes. Yet, in a new provision exempting solid metals from labeling requirements under certain conditions, OSHA has added language that appears to suggest that such items are not "articles" if workers could be exposed to a hazard during operations such as installation or alteration of the item.

OSHA apparently intended this interpretation to address situations in which downstream employees who shape, cut, drill, or otherwise handle the solid object could be exposed to hazards, and would therefore require substance-specific hazard information about each solid object. OSHA's preamble discussion suggests that only potential exposures related to installation need be considered by the upstream supplier; the supplier does not need to consider

"the possibility that exposure could occur when the item is repaired or worked on" (52 FR 31865). Nowhere does this distinction appear in the rule, however, and the question arises as to whether a practical distinction can be drawn between "installing," "working on," and "repairing."

It is difficult to understand why OSHA would consider such operations "normal conditions of use." If "normal conditions of use" apply to any possible exposure to any worker downstream, then the "article" exemption is exceedingly limited. Since manufacturers and distributors would have no way of knowing how downstream employers will treat or change the solid object, then, regardless of its hazard during its intended use, the object would be covered under the HCS, and MSDSs and labels would accompany it. The result of this interpretation would be a flood of paperwork accompanying solid objects that under normal conditions of use present no hazard at all. "Contractors will be virtually buried in MSDSs," stated the American Supply Association (Ex. 2-25).

Within the manufacturing sector, where solid objects may constitute the raw materials for extensive further processing, there may be some utility to this flow of information. Outside the manufacturing sector, however, the practical utility even in cases where such workers may be exposed seems dubious at best, and certainly has not been demonstrated in the record. Consider the case of a repairman who replaces pipe. To cut and remove existing pipe safely, he must have sufficient information and training to recognize different types of pipe and the hazards they may pose without benefit of a substance-specific MSDS or a label on the pipe. He needs no additional information to

install the new pipe safely. Clearly, in these cases the repairman would benefit far more from generic hazard training on pipes than from access to substance-specific information on new pipes. In such circumstances, it is difficult to see that the practical utility is sufficient to balance the paperwork burden imposed.

The record suggests that the detailed substance-specific information provided on the MSDS can be useful in a controlled work environment, such as a manufacturing facility, in which the employer knows what hazards are present and where. Detailed substance-specific information does not, however, seem to offer much practical benefit in uncontrolled environments, such as that faced on a construction site or by a repairman, where the employer knows generally but not specifically what hazards the employee will face, or when, or where. In uncontrolled situations, generic hazard training seems much more relevant to protecting workers from the array of hazards they may face and the materials handling decisions that they must make throughout the workday.

Outside the manufacturing sector, there is likely to be little practical utility to a requirement that MSDSs and labels accompany solid objects that would be "articles" under normal conditions of use. Although one possible option would be to define all such items as "articles" exempt from the standard, there may be alternatives, such as reliance on general hazard training, that would also be consistent with an employee's need to know and the requirements of the Paperwork Reduction Act. The Department is instructed to complete by March 1, 1988, a rulemaking to reconsider its present interpretation of "normal consumer use" and fully explore these alternatives. In addition, if OSHA

believes that further rulemaking is needed in specific cases to protect downstream users who handle or modify particular "articles," we look forward to assisting OSHA in developing a means for transmitting hazard information that is consistent with the Paperwork Reduction Act.

A similar concern has been expressed with regard to scrap metal, which appears to present special problems (1-22). Not only does scrap metal contain a great many substances, requiring voluminous MSDS and labels, but it also appears to pose little risk of significant exposure. We suggest that scrap metal that was classified as an "article" before it became scrap continue to fall under the "article" exemption.

Summary

In summary, the record does not demonstrate that certain paperwork requirements meet the criteria established in the Paperwork Reduction Act and its implementing regulations. Hence, we are disapproving the following paperwork requirements in the HCS, effective May 23, 1988:

- the requirement that material safety data sheets be provided on multi-employer worksites;
- coverage of any consumer product that falls within the "consumer products" exemption included in Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986;
- coverage of any drugs regulated by FDA in the non-manufacturing sector.

We are approving the remainder of the paperwork provisions in the HCS until May 23, 1988, on the condition

that the agency complete rulemaking according to the schedule detailed earlier. The rulemaking shall consider, at least, alternatives to the definition of "article," including a *de minimis* exemption and clarification of the concept of "normal conditions of use," and shall conform the requirements on the manufacturing sector with the requirements on the non-manufacturing sector in light of this decision.

The Department shall, pursuant to 1320.13(j) and 1320.14(f), publish a notice in the *Federal Register* on the next practicable publication date to inform the public of OMB's decision under the Paperwork Reduction Act. The notice shall include the text of this letter and any other information the Department feels is necessary and appropriate.

We look forward to working with you and your staff to ensure that the collection of information provisions of the HCS meet the goal of protecting employees from hazardous exposures in a manner consistent with the requirements of the Paperwork Reduction Act.

Sincerely,

/s/ WENDY L. GRAMM
Wendy L. Gramm
Administrator for Information
and Regulatory Affairs

cc: Honorable John A. Pendergrass
Assistant Secretary for
Occupational Safety and Health

Honorable C. William Verity
Secretary of the Department of Commerce

Honorable James Abdnor, Administrator for
Small Business Administration

APPENDIX F

U.S. Department of Labor
Jan. 14, 1988

ASSISTANT SECRETARY FOR
OCCUPATIONAL SAFETY AND HEALTH
WASHINGTON, D.C. 20210

[Seal]

The Honorable Wendy L. Gramm
Administrator for Information and
Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Dear Dr. Gramm:

I have been asked to respond on behalf of Assistant Secretary for Administration and Management Thomas C. Komarek to your letter of October 28, 1987, detailing the Office of Management and Budget (OMB) decision regarding the collection of information requirements in OSHA's hazard communication standard (HCS) promulgated August 24, 1987.

Citing authority under section 3504(h)(5)(D) of The Paperwork Reduction Act (PRA) and 5 CFR 1320.13(g) of OMB's implementing regulations, your office disapproved, effective May 23, 1988: (1) the requirement that material safety data sheets be provided on multi-employer worksites; (2) coverage of any consumer product excluded from the definition of "hazardous chemical" under section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986; and (3) coverage of any drug regulated by the Food and Drug Administration (FDA) in the non-

manufacturing sector. In addition, citing authority in 5 CFR 1320.14(f) and (g), all other paperwork requirements in the HCS were approved through May 23, 1988, on condition that OSHA adhere to a rulemaking schedule outlined in your letter to consider, at least, alternatives to the standard's "article" definition including a *de minimis* exemption and clarification of the concept of "normal conditions of use" of such products. Lastly, your office conditioned paperwork approval upon OSHA's consulting with the U.S. Small Business Administration and the Department of Commerce in order to develop a plan for a Federal administrative effort that will provide assistance to the regulated industry to alleviate start-up paperwork burdens and costs.

In light of OMB's decision, OSHA will initiate new rulemaking which will consider the issues specified in your letter. However, the rulemaking schedule delineated in your letter does not provide sufficient time to draft the notice of proposed rulemaking or satisfy procedural stages of the rulemaking not included in your schedule but which OSHA concludes are necessary. One rulemaking procedure not addressed by OMB involves OSHA's consultation with the Advisory Committee on Construction Safety and Health. Section 107 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 333, and 29 CFR 1911.11 of OSHA's regulations, require the Agency to consult with the Advisory Committee when formulating a rule promulgating, modifying or revoking a standard applicable to employment in construction work. A rulemaking to consider modifying provisions of the HCS applicable to construction work, which OSHA believes this rulemaking entails, requires the Agency to consult with the Advisory Committee.

The second public participation procedure not provided for by the OMB schedule involves public hearings. Under

the OSH Act, an informal hearing is required if an interested party requests one upon the filing of a written objection to the proposal [29 U.S.C. § 655(b)(3); 29 CFR 1911.11(b)(4), (c), (d)]. In light of the regulated community's substantial interest in the HCS, a request for a public hearing is very likely.

OSHA is committed to completing the rulemaking in the shortest time possible, preferably by the May 23 effective date of the rule. However, OSHA believes that even if all phases of drafting, clearance and public participation are completed in an expedited fashion, it is likely that the rulemaking process may extend beyond the May 23 date.

Members of your staff have indicated that, except for the three items specifically disapproved in your letter of October 28, you would agree to extend approval of all other collection of information requirements in the HCS until the end of September 1988, as long as OSHA initiates an expedited rulemaking. It is our understanding that this extension of recordkeeping approval would include the current "article" definition for the duration of the period required for consideration of the proposed changes to the definition initiated by your office. As you point out in your October 28 letter, OSHA acknowledges in the preamble to the August rule that exposures to releases of "very small quantities" of chemicals are not covered by the rule. Thus, absent evidence that releases of such very small quantities could present a health hazard to employees, the article exception to the rule's requirements would apply. Therefore, except for the three OMB disapproved requirements of the HCS, the remaining provisions will be effective and enforceable as scheduled in the standard.

Regarding the development of a plan to provide additional guidance and assistance to the regulated community in

order to reduce the paperwork compliance burden, please be assured that OSHA is expeditiously examining various alternatives and drafting a plan of action. OSHA intends to review this draft plan with the Small Business Administration and the Department of Commerce in the very near future and to submit it to your office at the earliest possible date.

Sincerely,

/s/ JOHN A. PENDERGRASS
John A. Pendergrass
Assistant Secretary

APPENDIX G

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

[Seal]

Apr. 13, 1988

Honorable Thomas C. Komarek
Assistant Secretary for
Administration and Management
Department of Labor
Washington, D.C. 20210

Dear Tom:

Pursuant to the Paperwork Reduction Act (the PRA—44 U.S.C. Chapter 35), we have completed our review of the request received from your office on March 7, 1988, to extend our prior approval of portions of the Hazard Communication Standard (HCS) past the current expiration date of May 23, 1988. Attached to your request for extension of approval was the January 14, 1988 letter from Assistant Secretary for Occupational Safety and Health John Pendergrass.

In his letter, Assistant Secretary Pendergrass assured us that, while the Department may not be able to complete a rulemaking by May 23, 1988, to reconsider the issues identified in our October 23, 1987 decision, the Department is "committed to completing the rulemaking in the shortest time possible. . . ." We also met with members of the Department on February 17, 1988, concerning the develop-

ment of a compliance assistance program. We understand that, despite lengthy delays, both of these efforts are proceeding, and that they will be completed expeditiously.

This letter is to inform you of our decision in light of these continuing efforts by the Department.

Approved Provisions

The HCS, a comprehensive regulatory program first put fully into effect for manufacturers on May 25, 1986, pursuant to the Occupational Safety and Health Act of 1970, is intended to provide employees with information about the potential hazards of chemicals to which they may be exposed on the job. It requires chemical manufacturers and importers to evaluate the hazards of chemicals they produce or import, to develop the technical hazard information for material safety data sheets (MSDS) and labels for hazardous substances, and to transmit the MSDSs and labels downstream to users of these substances. All employers are required to pass this information on to their workers through a comprehensive hazard communication program that includes a written hazard communication program and individual training.

Based on considerations of practicality, duplication, and the utility of coverage, the HCS incorporates several specific exemptions for products that are unlikely to pose risks to workers, such as food in a retail establishment packaged for sale to consumers, or products regulated by other Federal agencies. Section 1910.1200(b)(6)(iv) of the HCS exempts "articles" from the scope of the standard. An article is defined as:

> a manufactured item: (i) which is formed to a specific shape or design during manufacture; (ii) which has

> end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result in exposure to, a hazardous chemical under normal conditions of use.

In our October 23, 1987 decision, we determined that neither the record nor the Department's statement of justification supported the definition of "article" in part because the definition contained no express "de minimis" exemption regarding trivial risks. Hence, the definition did not clearly exempt from the HCS many items that emitted very small quantities of substances and for which the paperwork burdens of transmitting hazard information would have no practical utility. In response to our concerns, the January 14, 1988 letter from Assistant Secretary Pendergrass attached to your request for extension of approval clarified that "absent evidence that releases of such very small quantities could present a health hazard to employees, the article exception to the rule's requirements would apply." This clarification serves to exclude situations that involve trivial risks. Given these assurances that the rule does not cover releases of small quantities from products in the absence of evidence that the release presents a health hazard to employees, we have extended approval of the existing definition of "article," as clarified by the January 14 letter. In other words, our approval is limited to what you have requested, and therefore does not encompass collection of information requirements involving articles when there is an absence of evidence that small releases constitute a health hazard.

We have also extended our prior approval of all collection of information requirements in the HCS through April 1991, except the three provisions that we disapproved on

October 23, 1987. The approved requirements include the information collection requirements for hazard determination, written hazard communication programs, information and training programs, development and transmittal of MSDSs, labels and other appropriate forms of warning, and trade secrets. These paperwork provisions were approved in 1983 for the manufacturing sector (in 1986 for the trade secrets provisions).

This decision to extend our prior approval of portions of the HCS was reached after a careful balancing of several factors, including the importance of implementing on schedule those paperwork requirements that the existing record supports as consistent with the PRA, the clear concerns of the U.S. Court of Appeals for the Third Circuit that the HCS be effective without further delay, the Department's unsatisfactory record of compliance with the conditions of clearance contained in our October 23, 1987 decision, and the Department's and our obligations under the PRA.

Our extension of prior approval of portions of the HCS is made with the understanding that the Department will expeditiously inform the regulated community of this decision, will provide as soon as possible clear guidance to employers of their responsibilities in light of this decision, and will advise employers of the scope of the "article" exemption in light of the January 14, 1988 letter from Assistant Secretary Pendergrass and of this decision.

Disapproved Provisions

In our October 23, 1987 decision under the PRA, we disapproved three provisions:

- the requirement that material safety data sheets be provided on multi-employer worksites;

- coverage of any consumer product excluded from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986;

- coverage of any drugs regulated by FDA in the nonmanufacturing sector.

None of these provisions had been part of the original HCS, but rather first appeared in the August 24, 1987 rule extending coverage of the HCS to the nonmanufacturing sector. Although these provisions by themselves do not represent a substantial portion of the enormous paperwork burden imposed by the entirety of the expanded HCS (54 million hours in the first year alone), they do represent significant burdens for which the record did not demonstrate practical utility (a full discussion of the record is contained in our October 28, 1987 letter). We continue to disapprove these three provisions. Hence, under the PRA, these provisions will not become effective or enforceable on May 23, 1988.

The Department's Response to Our October 23, 1987 Decision

In our October 23, 1987 decision under the PRA, we determined that the record did not support certain provisions and would not allow approval. Hence, we disapproved the three requirements listed above. We also determined that reconsideration of the definition of "article" was needed in order to achieve consistency with the PRA. The reasons for our decision are fully explained in the October 28, 1987 letter.

We conditioned further approval on actions to be undertaken by the Department:

- Pursuant to 5 CFR 1320.14(f) and (g), we instructed the Department to complete a rulemaking examining alternatives to the definition of "article," including a de minimis exemption and clarification of the concept of "normal use," and conforming the language of the rule in light of our decision. We instructed the Department to publish a proposal by December 1, 1987, and a final rule by March 1, 1988. We explained that it was very important that OSHA promptly conclude its rulemaking to revise the standard, thereby giving OMB time to complete review of the final paperwork provisions and the public sufficient time to understand and implement the revisions prior to the effective date of the standard.

- We also determined that an administrative effort by OSHA to assist the regulated community to understand and comply with the standard could substantially reduce the start-up paperwork burden and costs of the standard, particularly those of small business. We instructed the Department to submit a plan by January 1, 1988, that would provide such assistance as appropriate.

These timetables were not met. In his January 14, 1988 letter, Assistant Secretary Pendergrass advised us that OSHA would not meet the timetable established for the rulemaking, and may not be able to complete a rulemaking until after the May 23rd effective date, but, as previously cited, he assured us that the Department is now "committed to completing the rulemaking in the shortest time possible. . . ." OSHA has also informed us that the major elements of a plan for compliance assistance will probably not be available until early summer, after the effective date of the standard. We understand that the Department is now moving forward on each of these efforts, and that they will be completed as expeditiously as possible.

Discussion of Decision

Despite the Department's failure to meet the conditions of clearance, however, we have determined that extension of approval of the previously-approved provisions is consistent with the PRA. We determined in our October 23, 1987 decision that the existing record supports these provisions as consistent with the Act. These approved paperwork provisions, which include hazard determination, written hazard communication and training programs, MSDS development and transmittal, and labelling, comprise the heart of the HCS. For the vast majority of workplaces, these provisions are largely independent of the specific substances or products for which MSDSs are generated. Indeed, the HCS is designed so that the basic mechanisms for transmitting hazard information will not require substantial revision as the substances in the workplace and consequently the number of MSDSs changes over time. Hence, our disapprovals of coverage for certain products should not substantially affect compliance with the other provisions of the HCS.

Commenters have requested that OMB not extend approval of the previously-approved provisions of the HCS until the Department has completed a compliance assistance program and its rulemaking, in light of the difficulty of implementing a "partial" rule and of OSHA's failure to provide any compliance assistance thus far. The Coalition of Construction Industry Trade Associations, for example, maintains that, "there is no way that construction in-

dustry employers can 'develop, implement and maintain at the workplace a written hazard communication program' . . . when the parameters of multi-employer worksite disclosure and training are yet to be determined" (see January 22, 1988 letter from the Coalition of Construction Industry Trade Associations and February 9, 1988 letter from the Associated General Contractors of America in OMB paperwork docket 1218-0072). The National Association of Wholesaler-Distributors also requested that OMB not extend approval of the requirements applicable to the nonmanufacturing sector because such extension would "generate chaos in the nonmanufacturing sector and cannot be justified."

The concerns of these commenters are largely based on the possibility that the standard and OMB's decision under the PRA will change dramatically as a result of the rulemaking. Although change is always possible, any such change would be fully considered during the rulemaking process. Of course, in order for OMB to grant PRA approvals, any changes must offer sufficient practical utility to justify any incremental paperwork burden they impose, including the burden of revising already-developed written programs. Moreover, as stated above, we are continuing to disapprove the previously-disapproved provisions; the rulemaking should of course conform the rule to these disapprovals.

Therefore, the confusion and potential paperwork duplication resulting from the delayed agency rulemaking, while regrettable and avoidable, do not, on balance, outweigh the value of putting into effect the key components of the standard (see also February 2, 1988 letters from the Building and Construction Trades Department of the AFL-CIO, and from the AFL-CIO and the United Steel

Workers of America, and the February 2, 1988 letter from the Working Group on Community Right to Know concerning the potential impact of the OMB decision on Title III of the Superfund Amendments and Reauthorization Act of 1986, in OMB paperwork docket 1218-0072).

Our extension of approval is, of course, based on the existing record and may be revised on the basis of new information. Accordingly, if any new information concerning this standard is collected in the course of further rulemaking proceedings, we will review that information to determine if reconsideration of our decisions under the PRA is warranted. Absent evidence that approved provisions are clearly inconsistent with the PRA, or that alternatives to the disapproved provisions would clearly be consistent with the PRA, however, we have no basis for changes in our prior decisions. If the paperwork already implemented is to carry out effectively the goals of the HCS, there should be stability and predictability, not continuing tumult and change.

The Department shall publish a notice in the *Federal Register* on the next practicable publication date to inform the public of OMB's decision under the PRA. The notice shall include the text of this letter. We trust that the Department will continue to make progress in meeting the terms of our decisions under the PRA.

Sincerely,

/s/ JAMES B. MACRAE, JR.
James B. MacRae, Jr.
Acting Administrator and
Deputy Administrator
Office of Information
and Regulatory Affairs

cc: Honorable John A. Pendergrass
Assistant Secretary for
Occupational Safety and Health

Honorable C. William Verity
Secretary of the Department of Commerce

Honorable James Abdnor, Administrator for
Small Business Administration

:: U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00105